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I

Trial by jury and freedom from governmental oppression have been closely intertwined in the American political experience, so much so that, of the numerous procedural rights recognized in eighteenth-century America, the right to trial by jury in criminal prosecutions was the only procedural safeguard guaranteed by the constitutions and bills of rights of all the original states. Moreover, although the framers of the federal Constitution omitted reference to most traditional liberties and procedural rights in the document, they made explicit provision[1] for jury trials in criminal cases. In 1788, Alexander Hamilton expressed the sentiment of the time as follows:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[2]

The universal approbation which Hamilton credited to the right of trial by jury in his own day did not, as we know, survive the following century. With the possible exception of the prohibition against compulsory self-incrimination, the right of trial by jury in both criminal and civil cases has been the subject of more controversy than any other constitutional safeguard.[3]

In recent years, the Supreme Court has sided with the champions of the right to trial by jury in criminal cases. When the Court incorporated the sixth amendment right to jury trial into the due process clause of the fourteenth amendment in *Duncan* v. *Louisiana*,[4] it restated, with elaboration, the sentiment cited by Hamilton one hundred and eighty years before:

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1 U.S. Const. art. III, § 2.

2 THE FEDERALIST No. 83, at 521-22 (B. Wright ed. 1961) (A. Hamilton).

3 A discussion of the debates waged over the merits of the jury system is beyond the scope of this article. For a selective bibliography of the controversy see H. KALVEN & H. ZEISEL, THE AMERICAN JURY at 4 n.2 (1966) [hereinafter cited as KALVEN & ZEISEL].

4 391 U.S. 145 (1968). The Court reversed a decision of the Supreme Court of Louisiana sustaining a conviction for simple battery upon summary trial of the accused. The maximum punishment prescribed for the offense was two-years' imprisonment and a $300 fine. Under Louisiana law the offense was not triable by jury, the state constitution providing as follows:

> All cases in which the punishment may not be at hard labor shall . . . be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict. LA. CONST. art. VII, § 41.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.[5]

A few earlier decisions[6] of the Court contained dicta which clearly suggested that the right of trial by jury was not binding upon the states, but the vitality of these dicta had been seriously undermined in the decade preceding *Duncan.* During this period a majority of the Court, while continuing to reject the argument that the fourteenth amendment incorporated all of the guarantees contained in the Bill of Rights, sanctioned selective incorporation of specific guarantees. This incorporation process had brought the majority of the fourth, fifth and sixth amendment guarantees within the due process clause of the fourteenth amendment.[7]

At the same time, evidence was accumulating that the Court ascribed high value to trial by jury in criminal prosecutions. In a series of cases antedating *Duncan,* increasingly rigorous standards were imposed to prevent discrimination in the selection of jurors.[8] In other cases, the Court resisted the extension of sum-

5 *Id.* at 155-56.

6 Palko v. Connecticut, 302 U.S. 319 (1937); Snyder v. Massachusetts, 291 U.S. 97 (1934); Maxwell v. Dow, 176 U.S. 581 (1900).

7 The guarantees incorporated prior to *Duncan* included: the right to compulsory process to obtain witnesses (Washington v. Texas, 388 U.S. 14 (1967)); the right to a speedy trial (Klopfer v. North Carolina, 386 U.S. 213 (1967)); the right to confront opposing witnesses (Pointer v. Texas, 380 U.S. 400 (1965)); the right to trial by an impartial jury (Turner v. Louisiana, 379 U.S. 466 (1965)); the right against self-incrimination (Malloy v. Hogan, 378 U.S. 1 (1964)); the right to counsel (Gideon v. Wainwright, 372 U.S. 335 (1963)); the right against cruel and unusual punishment (Robinson v. California, 370 U.S. 660 (1962)); the right against unreasonable search and seizure (Mapp v. Ohio, 367 U.S. 643 (1961)); the right to a public trial (*In re* Oliver, 333 U.S. 257 (1948)).

Thus, at the time *Duncan* was argued, only a few of the criminal procedural safeguards of the Bill of Rights had not yet been made binding upon the states. In addition to trial by jury, these included the right to a grand jury and the prohibition against double jeopardy. The latter was subsequently incorporated in Benton v. Maryland, 395 U.S. 784 (1969).

8 Jones v. Georgia, 389 U.S. 24 (1967) (racial discrimination); Hernandez v. Texas, 347 U.S. 475 (1954) (discrimination on the basis of national origin); Ballard v. United

mary procedures to situations where trial by jury previously was available,[9] and extended the right of trial by jury to areas in which summary trials traditionally had been permitted.[10]

New judicial doctrine — no less than the acquisition of new knowledge — generally raises more questions than it settles. By imposing the trial by jury guarantee of the sixth amendment upon the states, the Court invited, even necessitated, further inquiry into the nature and latitude of that guarantee. As long as the Constitution safeguarded trial by jury only in federal prosecutions, opportunities for delineating the right were confined to a rather narrow range of federal practices. But with the right now made binding upon the states, a greater variety of trial procedures may be challenged as violative of the sixth amendment; consequently, the contours of the right to jury trial are being developed and reworked with greater precision.

Despite the sweeping command of the sixth amendment and the broad language of article III,[11] the Supreme Court has repeatedly held that trial by jury is guaranteed only in prosecutions for serious crimes.[12] Conversely, those charged with so-called petty offenses may be tried summarily, if the law so provides.[13] In *Duncan* this traditional doctrine was reaffirmed, without extensive reevaluation, the majority advancing familiar historical and policy arguments to support its conclusion:

States, 329 U.S. 187 (1946) (discrimination on the basis of sex). Virtually contemporaneous with its decision in *Duncan,* the Court barred one species of ideological discrimination when, in Witherspoon v. Illinois, 391 U.S. 510 (1968), it held that a state may not, in capital cases, exclude from juries persons having conscientious scruples against the death penalty — at least where such persons do not signify that they would necessarily vote against imposition of that penalty.

9 *See, e.g.,* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Reid v. Covert, 354 U.S. 1 (1957), *rev'g on rehearing,* Kinsella v. Krueger, 351 U.S. 470 (1956) and Reid v. Covert, 351 U.S. 487 (1956); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955). In these cases the Court disapproved of Congressional attempts to extend court-martial jurisdiction to certain classes of civilians, in each case citing the denial of jury trial as one basis for requiring prosecution before an article III court.

10 In Cheff v. Schnackenberg, 384 U.S. 373 (1966), the Court, exercising its supervisory powers, ruled that federal courts may not impose sentences exceeding six months for criminal contempts unless the defendant is granted the right of trial by jury. Although *Cheff* did not overrule Green v. United States, 356 U.S. 165 (1958) (where the Court had reaffirmed the validity of summary trial for criminal contempt, even though the punishment imposed was severe), it is clear that the authority of *Green* was badly impaired. In Bloom v. Illinois, 391 U.S. 194 (1968), decided on the same day as *Duncan,* the right to jury trial in state prosecutions for serious criminal contempts was accorded constitutional status.

This trend toward enlargement of the right to trial by jury also appears in O'Callahan v. Parker, 395 U.S. 258 (1969). In a 5 to 3 decision, the Court held that there is no court-martial jurisdiction to try a serviceman for a crime which has no military significance where the offense is committed off post and while the defendant was on leave.

Whether the right to jury trial will be extended still further — for example, to certain juvenile court proceedings — remains in doubt. See DeBacker v. Brainard, 396 U.S. 28 (1969); *In re* Whittington, 391 U.S. 341 (1968); *In re* Gault, 387 U.S. 1 (1967).

11 The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

Article III provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .

12 District of Columbia v. Clawans, 300 U.S. 617 (1937); District of Columbia v. Colts, 282 U.S. 63 (1930); Schick v. United States, 195 U.S. 65 (1904); Callan v. Wilson, 127 U.S. 540 (1888).

13 *Id.*

> So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established common-law practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.[14]

While these arguments are not, as we shall presently see, invulnerable, the petty offense exception to the constitutional guarantees of jury trial seems to have been challenged within the Court in only two decided cases and, on those occasions, in minority opinions.[15]

In differentiating between offenses for which jury trials, unless waived, must be granted and those for which bench trials may be provided, the Court traditionally fixed upon two determinants — the nature of the offense, and the severity of the maximum punishment which might be inflicted for its commission.[16] Under this twofold test, an offense is deemed petty if it is not intrinsically grave *and* if the authorized penalty is relatively light. The first of these determinants is extremely vague, leaving to the Court nearly unfettered discretion, and judicial resort to so-called objective criteria for evaluating the nature of the offense has provided little clarification. In making its assessments, the Court has rejected the felony-misdemeanor dichotomy as identical with the distinction between serious and petty offenses,[17] but has considered whether the offense is *malum in se* or *malum prohibitum,*[18] whether it was indictable at common law,[19] whether it was of a kind triable summarily at the time the Constitution was adopted,[20] and whether it is defined by state statute or by municipal ordinance.[21]

Despite the imprecision of this test, in cases where the Court has differentiated between serious and petty crimes, the nature of the offense was always the primary consideration. Prior to *Duncan* there was no case in which the Court found the accused to be constitutionally entitled to a jury trial solely on the basis of the penalty which might be imposed. In *Duncan,* however, it was precisely this consideration which accounted for the Court's reversal of the conviction. The Court did not discuss the nature of the offense involved (simple battery); instead, it merely stated that "the penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments."[22] The possibility of imprisonment for as much as two years persuaded the Court that the crime

14 391 U.S. 145 at 160.
15 *See* Baldwin v. New York, 339 U.S. 66, 74-76 (1970) (Black and Douglas, JJ., concurring in part); District of Columbia v. Clawans, 300 U.S. 617, 633-34 (1937) (McReynolds and Butler, JJ., concurring).
16 *E.g.,* District of Columbia v. Clawans, 300 U.S. 617 (1937).
17 *E.g.,* Callan v. Wilson, 127 U.S. 540, 549 (1888).
18 *E.g.,* District of Columbia v. Colts, 282 U.S. 63, 73 (1930); Schick v. United States, 195 U.S. 65, 67 (1904).
19 *E.g.,* District of Columbia v. Clawans, 300 U.S. 617, 625 (1937); District of Columbia v. Colts, 282 U.S. 63, 73 (1930).
20 *E.g.,* District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); Callan v. Wilson, 127 U.S. 540, 555 (1888).
21 *E.g.,* Natal v. Louisiana, 139 U.S. 621, 624 (1891).
22 391 U.S. 145 at 160 (1968).

was serious. The Court noted that offenses carrying punishments of up to six months' imprisonment were deemed petty for purposes of federal prosecutions,[23] but declined to draw a dividing line between petty and serious offenses.

In subsequent cases,[24] the Court has clearly indicated that it now considers the severity of the authorized penalty for the crime charged to be determinative of an accused's right to a jury trial.[25] And the Court has drawn a line between petty and serious offenses at six months.[26] In doing so, it has reaffirmed the validity of the petty offense exception to the unqualified language of article III and of the sixth amendment.

II

As previously noted, both historical and policy arguments have commonly been adduced to support the conclusion that the literally unqualified commands of article III and of the sixth amendment were designed to safeguard trial by jury only in prosecution for serious crimes. Although this conclusion now seems to be embedded too firmly in constitutional doctrine for outright repudiation, the weaknesses of the supporting arguments warrant some redefinition of the petty offense exception, as well as a reappraisal and modification of the test for differentiating between serious and petty offenses.

The historical argument supporting the conclusion that trial by jury need not be provided in prosecutions for minor offenses was first suggested by the Court in *Callan* v. *Wilson*,[27] and it was developed fully in an elaborate study by Felix Frankfurter and Thomas Corcoran, published in 1926.[28] Essentially, this argument is based upon two propositions: first, that at the time the Constitution and the Bill of Rights were adopted, the states followed the already traditional English and colonial practice of providing only bench trials for those charged with certain minor offenses; and second, that an intention to deny Congress the power to provide for nonjury trials in similar situations is not to be imputed to those who framed and ratified the Constitution and, later, the sixth amendment, despite the unqualified language which they employed in guaranteeing trial by jury.

The correctness of the first of these propositions is not to be doubted, for there is massive evidence that the states, like the American colonies, made statutory provision for summary trials of certain offenses. But the correctness of the proposition that the authors of the constitutional guarantees of trial by jury intended to sanction statutory provision for bench trials in federal prosecutions for petty offenses is much more doubtful. Without thoroughly recanvassing the objections to this assumption, which have been forcefully stated by George Kaye,[29]

23 18 U.S.C. § 1 (1964). *See also* Cheff v. Schnockenberg, 384 U.S. 373 (1966).

24 Baldwin v. New York, 399 U.S. 66 (1970); Frank v. United States, 395 U.S. 147 (1969).

25 A footnote to the *Baldwin* opinion suggests that the nature of the crime may still be relevant in determining whether it is serious or petty. 399 U.S. at 69 n.6 (1970).

26 *Id.* at 69.

27 127 U.S. 540 (1888).

28 Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917 (1926) [hereinafter cited as Frankfurter and Corcoran].

29 *See* Kaye, *Petty Offenders Have No Peers!*, 26 U. CHI. L. REV. 245 (1959) [hereinafter cited as Kaye].

we may note that if an exception in favor of summary trials were intended, the draftsmen of article III and of the sixth amendment chose singularly inept language to convey that meaning.[30] Moreover, the fact that summary trials were sanctioned by the states in face of their own constitutional guarantees of trial by jury is not persuasive with respect to the scope of the federal right — as the Frankfurter-Corcoran article maintained — unless the state constitutional provisions were fairly comparable with those of article III and of the sixth amendment. But, in fact, in most instances, the state guarantees were much less comprehensively phrased, and such restricted phraseology might have been introduced by the framers if they had intended to sanction summary proceedings in some criminal cases.[31]

Proponents of the petty offense doctrine do not, however, rest their case on history alone. Important prudential reasons are cited to support the view that minor crimes may or should be tried summarily. Essentially, two policy arguments, both based upon a balancing of adverse interests, are advanced. First, there is a suggestion that summary trial of petty offenders, by alleviating some of the congestion of jury dockets, expedites the trials of persons accused of serious crimes and thereby benefits them.[32] Second, the public benefit accruing from speedy and inexpensive summary trials outweighs the comparatively small prejudice to the petty offender resulting from his being deprived of trial by jury.[33] Although, as Kaye rejoins, this particular weighing of social and individual interests inverts some professed American values, this is less extraordinary than it may first appear. Notwithstanding the much touted primacy of the individual in the American hierarchy of values, courts quite commonly prefer social over conflicting individual interests when judicial choices are cast in that way rather than in terms of competing social interests.[34] And, of course, such a result follows if the public interest is perceived as significant and the private interest as trivial — an assumption which defenders of the petty offense exception easily make.

Few critics of the petty offense doctrine, for all their reservations respecting its historical and policy credentials, have renounced it completely, however. Most have recoiled at the prospect of additional congestion and delays in the administration of both criminal and civil justice which might result from extension of the right to jury trial to every federal criminal proceeding, to say nothing of every state prosecution. This concern cannot be lightly dismissed, even though the waiver rate with reference to trials of petty offenders would in all likelihood be high, as it has been in those jurisdictions now granting jury trials in minor criminal cases.[35]

Even Kaye, the most articulate critic of the petty offense exception, ultimately

30 In neither article III nor the sixth amendment is there any language differentiating between grave and petty offenses, but the guarantee of grand jury indictment in the fifth amendment is explicitly limited to prosecutions "for a capital, or otherwise infamous crime." *See* United States v. Moreland, 258 U.S. 433 (1922).

31 *See* Kaye, *supra* note 29.

32 Frankfurter and Corcoran, *supra* note 28 at 976.

33 *See* Katz v. Eldridge, 97 N.J.L. 123, 117 A. 841 (1922).

34 *Compare* Uphaus v. Wyman, 360 U.S. 72 (1959) *with* Sweezy v. New Hampshire, 354 U.S. 234 (1957).

35 Until 1969, California provided for trial by jury in all criminal cases, regardless of the penalty. While the waiver rate was high, the burden upon municipal courts was nevertheless substantial. *See* JUDICIAL COUNCIL OF CALIFORNIA REPORT 15-16 (1967).

temporizes by suggesting a reformulation of the test for distinguishing between offenses for which jury trials are guaranteed and those which may be prosecuted summarily. The test that he proposes would focus essentially upon the type of penalty which the law imposes rather than the intrinsic gravity of the crime or the severity of the authorized punishment for its commission. Thus, he argues that the jury trial provisions of article III and of the sixth amendment are controlling in prosecutions where the *liberty* of the accused is at stake. Conversely, where the *property* of the defendant is jeopardized — i.e., where the statute imposes only a fine or forfeiture for the offense charged — these guarantees do not apply, although the civil jury guarantee of the seventh amendment may afford limited protection in such situations.[36] There is a suggestion of this distinction — as between offenses involving a deprivation of liberty upon conviction and those punishable only by fines — in some earlier language of the Supreme Court, particularly in *Callan* v. *Wilson*.[37] And it was revived by Justices Black and Douglas in a recent dissenting opinion:

> I do not deny that there might possibly be some offenses charged for which the punishment is so miniscule that it might be thought of as petty. But to my way of thinking, when a man is charged by a governmental unit with conduct for which the Government can impose a penalty of imprisonment for any amount of time, I doubt if I could ever hold it petty.[38]

However seductive, for its libertarian ramifications, this particular accommodation of the right to jury trial with the exigencies of administering justice may be, such a formulation of the test is more ingenious than convincing. The historical evidence for construing the jury trial guarantees as applicable only to prosecutions where life or liberty is at stake, which Kaye attempts to document, is probably even more tenuous than the historical argument which he so ably rebutted.[39] Moreover, some of the policy implications of this distinction could

36 Kaye, *supra* note 29, at 275-76.

37 127 U.S. 540 at 549.

38 Frank v. United States, 395 U.S. 147, 160 (1969). See also Baldwin v. New York, 399 U.S. 66, 74-76 (1970) (Black & Douglas, JJ., concurring in part).

39 According to Kaye:

> [I]t is only where personal liberty is involved that the jury guarantees of Article III and Amendment VI come into play. Alexander Hamilton said that the friends of the plan of the Federal Convention, who as to this matter constituted the more conservative group, regarded the trial by jury "as a valuable safeguard to liberty." Hamilton's further elucidation of the topic in *The Federalist* clearly shows that the jury assurance of Article III was designed, in accordance with the attitude of the time, to secure personal liberty, and that the protection of private property was left to Congressional statutory regulation. Kaye, *supra* note 29, at 274-75.

The foregoing conclusion, however, is hardly supported by Hamilton's statement, which was as follows:

> [I] cannot readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas-corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for, in the most ample manner, in the plan of the convention. THE FEDERALIST No. 83, at 522 (B. Wright ed. 1961) (A. Hamilton).

A less tortured reading of Hamilton's statement suggests that he was simply chiding critics of the Constitution for their exaggerated emphasis upon the importance of trial by jury in civil cases, for which the document made no explicit provision.

prove exceedingly troublesome. To circumvent the jury trial guarantee, governments might specify fines instead of imprisonment for various offenses, but it is obvious that these too could be oppressive. In the spectrum of criminal punishments there is probably a point for nearly everyone at which a fine, because of the amount involved, becomes more onerous than a relatively short jail sentence. And what of the criminal defendant who upon conviction is unable to pay the assessed fine? Would the prospect that the indigent defendant will be imprisoned under a conversion statute entitle him to trial by jury while a defendant charged with the same offense and able to pay a fine could be tried summarily?[40]

III

If the petty offense exception to the jury trial guarantees of article III and the sixth amendment is to be retained as constitutional docrine, a more sensitive and comprehensive test than has been applied is needed to preserve fundamental constitutional values. The exception itself and the tests by which it has been implemented have been defended upon the basis of history and as a judicial accommodation of competing interests, but neither ground provides altogether persuasive support for the prevailing doctrine. A closer reading of history and a more perceptive application of the balancing test suggest that, as a minimum, the right to trial by jury should extend to all criminal prosecutions in which substantial first amendment claims are asserted by the accused in defense of his activity, even though the crime with which he is charged is not intrinsically grave and the penalty which may be imposed is relatively light.

Historically, trial by jury in criminal prosecutions has been tied closely to freedom from governmental oppression. This association was acknowledged by Hamilton in THE FEDERALIST, and it was reaffirmed by the Court in *Duncan*. Although the freedom which trial by jury was understood to protect was no doubt a generalized conception, it had acquired, by the time the Constitution was adopted, a special meaning with reference to civil liberty, specifically as a safeguard of political expression and of religious conscience. The constricted common law definition of freedom of speech and of the press as merely freedom from previous restraints, which was authoritatively stated by Blackstone, remained intact and virtually unquestioned during the American Revolution and the formative years preceding and immediately following adoption of the Constitution.[41] But throughout the eighteenth century there was recurrent agitation for modification of prosecutorial and judicial procedures in seditious libel cases—the cases in which freedom of expression was most directly imperiled. Both in England and America the most insistent demands of eighteenth-century reformers were for judicial recognition of the truth of the published matter as an adequate defense and for investing the petty jury, whose then limited function in sedition cases was to decide upon the fact of publication by the accused, with

40 *See* Winters v. Beck, *cert. denied*, 385 U.S. 907 (1966) (Stewart, J., dissenting).
41 *See* L. LEVY, LEGACY OF SUPPRESSION 13-15 (1960) [hereinafter cited as LEVY].

the power to render a general verdict.[42] These demands were not simply the product of heady speculation. The possibility that lay jurors might frustrate oppressive prosecutions and temper the application of harsh laws had been confirmed by experience. Instances in which grand juries refused to return indictments against errant publishers were fairly numerous.[43] And there were a few dramatic and highly publicized trials, such as that of Peter Zenger, where petty juries, despite the restricted role ascribed to them in sedition cases, rendered acquittal verdicts.[44] Thus, Americans of the eighteenth century had some reason to regard the right to trial by jury as, in Hamilton's words, either "a valuable safeguard to liberty or as the very palladium of free government."[45] Exceptions to the jury trial mandates of the Constitution which fail to take into account the close historical nexus between these guarantees and freedom of expression are, at best, of doubtful validity.

The case for reshaping the petty offense doctrine so as to extend the right to jury trial to all criminal prosecutions involving first amendment claims does not, however, rest primarily upon a new reading of history. Precisely the same conclusion is even more strongly indicated by a sensitive application of the balancing test which judges and commentators have invoked in support of the current doctrine. Provision for summary trials, as we have seen, has been defended upon the ground that the prejudice to the petty offender occasioned by such procedures is outweighed by the public interest in the expeditious administration of justice. In times of soaring crime rates, congested jury dockets, and long delays in the disposition of civil and criminal cases, this asserted public interest should not be minimized, even though constitutionally less suspect but politically more painful means of alleviation may be available.

At best, constitutional doctrine representing an accommodation of diverse interests and values is tenable only insofar as relevant interests and values are fully discerned and then placed upon the judicial scales. The balancing purporting to sustain current doctrine has been extremely simplistic, but perhaps for ordinary prosecutions, the prejudice to the accused occasioned by summary trials as against the public interest in the efficient administration of justice may be regarded as the principal parameters for judicial doctrine-making with reference to the jury trial guarantees of the Constitution. Moreover, if these are the interests to be accommodated, rational distinctions may be made in terms of the intrinsic gravity of the offense and the severity of the authorized punishment.

Even if the current doctrine is satisfactory with respect to ordinary prosecutions, it is deficient with reference to criminal proceedings against persons asserting first amendment rights. This is not to argue that the interest of the individual defendant in such cases is necessarily more important than in prosecutions where no such right is claimed. What is asserted is that prosecutions in which defendants plead first amendment rights, as the Supreme Court itself has repeatedly ad-

42 *Id.* at 171-72. Levy attributes the emergence of a broad libertarian theory of the scope of the first amendment, a theory repudiating the common law of seditious libel, not to the framers of the amendment but to Jeffersonians in reaction to prosecutions under the Sedition Act of 1798.

43 *Id.* at 258-59.

44 *See* V. BURANELLI, THE TRIAL OF PETER ZENGER (1957).

45 THE FEDERALIST No. 83, at 521-22 (B. Wright ed. 1961) (A. Hamilton).

monished, involve social interests of transcendent importance, which, as translated into constitutional values, are entitled to jealous protection.[46] Such protection may be afforded, of course, by attributing broad substantive meaning to first amendment freedoms as a matter of law. But solicitude for first amendment freedoms has been evidenced as well by judicial insistence upon special procedures whereby these liberties may be defended against infringement. Among the decided cases involving first amendment claims are those in which the Court reallocated the burden of proof[47] and modified requisites of standing,[48] standards of permissible statutory vagueness,[49] rules of abstention,[50] and principles of statutory construction.[51] At the same time the Court, while not extending any procedural safeguards of the Bill of Rights to first amendment cases on that account alone,[52] has applied some of those guarantees with extraordinary rigor in such cases.[53]

The social interest in protecting freedom of expression implicit in cases having a first amendment dimension is neither diminished nor attenuated by the consideration that the offense is petty, whether the applicable test is the nature of the offense or the severity of the maximum penalty which the law prescribes. Prosecutions for such low visibility crimes as breach of the peace, obstruction of passageways, and conducting a public meeting without a permit, to name but a few, may have serious deterrent effects upon the exercise of first amendment liberties, to say nothing of those instituted under statutes and ordinances which explicitly restrict speech and publication.[54] At the same time, it is arguable, in terms of the very standards now utilized by the Court, that the social interest in deterring the prohibited conduct is relatively low. The fact that an offense carries only a slight punishment and is not intrinsically grave—that it is, let us say, defined by municipal ordinance rather than by general penal statute, or is *malum prohibitum* rather than *malum in se*—may signify a minimal social interest in suppressing the proscribed activity. Such an interest, of course, may very well suffice to sustain the substantive validity of ordinary penal legislation as well as

46 *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967); Sherbert v. Verner, 374 U.S. 398 (1963); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); Speiser v. Randall, 357 U.S. 513 (1958).

47 Speiser v. Randall, 357 U.S. 513 (1958).

48 Flast v. Cohen, 392 U.S. 83 (1968); Dombrowski v. Pfister, 380 U.S. 479 (1965).

49 Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965).

50 Dombrowski v. Pfister, 380 U.S. 479 (1965).

51 Watts v. United States, 394 U.S. 705 (1969); Schneider v. Smith, 390 U.S. 17 (1968).

52 There have been suggestions to that effect in a few minority opinions. *See, e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 199-203 (1964) (Warren and Clark, JJ., dissenting); Kingsley v. Brown, 354 U.S. 436, 447-48 (1957) (Brennan, J., dissenting).

With respect to most of the procedural specifics of the Bill of Rights, however, no special problem concerning their applicability in first amendment cases arises, for they are generally binding in all criminal prosecutions regardless of the gravity of the offense. But the right to assistance of counsel, in the sense of the right of the indigent defendant to have counsel provided is guaranteed only in felony prosecutions. Gideon v. Wainwright, 372 U.S. 335 (1963); *See also* DeJoseph v. Connecticut, *cert. denied,* 385 U.S. 982 (1966) (Stewart, J., joined by Black and Douglas, JJ., dissenting), Winters v. Beck, *cert. denied,* 385 U.S. 907 (1966) (Stewart, J., dissenting).

53 *See* Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518 (1970).

54 Certain offenses of this kind may very well be deemed petty by current definition. For example, in eighteen states at least some offenses against obscenity laws are only punishable by fine or imprisonment for six months or less; consequently, these qualify as petty offenses under the doctrine of Baldwin v. New York, 399 U.S. 66 (1970).

provision for summary procedures in the trial of offenders, where no competing social interest can be asserted. But a countervailing interest, as the Court has repeatedly stated, is present when first amendment rights are in contention, and, if this interest is accorded appropriate weight, quite different conclusions seem to be indicated.

IV

The proposition that the constitutional right to trial by jury should be granted in all prosecutions in which substantial first amendment claims are asserted has thus far presupposed that such an extension of the right would, in fact, subserve the social interest in freedom of expression. This presupposition, of course, is not incontestable,[55] and, whatever may be the weaknesses of existing constitutional doctrine, the case for modification should not be permitted to rest upon unquestioned assumptions.

Critics of trial by jury repeatedly cite the failures of juries to protect political offenders and spokesmen for unpopular causes. They remind us that prosecutions under the notorious Alien and Sedition Acts of 1798 resulted, with a single exception, in guilty verdicts, even though juries were empowered, under that legislation, to render general verdicts.[56] Moreover, in later periods (e.g., during World War I and its aftermath), the jury's record as a protector of free expression was unimpressive.[57] Such criticism, however, fails to take into full account the confluence of popular and official hysteria at these times. When both the people and their government are caught up by the rhetoric of national survival, experience indicates that neither judges nor juries are likely to be dependable bulwarks against oppression. More important still, the tarnished civil liberties record of juries, which critics of the institution cite, is a record compiled when first amendment freedoms were narrowly conceived and when juries were even less representative than now of a cross section of the whole community. There is no substantial evidence that the civil liberties records of judges, particularly at the trial court level, have been any better in prosecutions in which the right to jury trial was denied or had been waived.

In the past three decades, as we know, first amendment freedoms have been interpreted expansively. The latitude of these guarantees is judicially determined, and the court properly has the exclusive function of deciding whether a statute restrictive of first amendment freedoms is valid upon its face.[58] If the statute is not invalid, the court performs — explicitly when a jury is used, but often implicitly in bench trials — the vital function of defining the limits which the first amendment imposes upon the application of the statute to the defendant's conduct.[59] The court also decides whether the evidence, as a matter of law, is sufficient, in light of pertinent constitutional limitations, to sustain a conviction

55 See Monaghan, *supra* note 53, at 526-32.
56 LEVY, *supra* note 41, at 131.
57 *See* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 70-73 (1948); Broeder, *The Functions of the Jury*, 21 U. CHI. L. REV. 386, 414-15 (1954).
58 *E.g.*, Shuttlesworth v. Birmingham, 394 U.S. 147 (1968).
59 *See, e.g.*, Watts v. United States, 394 U.S. 705 (1969).

under the statute.[60] Extension of the right to trial by jury to prosecutions involving first amendment claims would not detract from the safeguards now afforded by trial and appellate courts. The fact-finding function is essentially a contingent one which, especially when performed by a jury rather than by the trial court, may afford an additional barrier against dubious restraints in the twilight zone between liberty and license.

There is, of course, no assurance that a particular jury will be more sensitive to the first amendment claims of an accused than the judge would be, but the jury constitutes a further institutional check upon judges who are unreceptive to such assertions of right. We now have substantial empirical evidence that in a significant number of cases judges and juries differ as to what the verdict should be.[61] Although these disagreements may operate in both directions, with the judge being either less or more sympathetic than the jury toward the defendant, "when only pure fact-finding is involved, the jury tends to give more weight than the judge to the norm that there should be no conviction without proof beyond a reasonable doubt."[62] In other words, the jury tends to resolve doubts in favor of the criminal defendant, and, incidentally, and perhaps unconsciously, in favor of the defendant's asserted freedom. Where "the jury does more than find the facts . . . depending on how one looks at it, the jury can be said to do equity, to legislate interstitially, to implement its own norms, or to exhibit bias."[63] It thus performs the time-honored function of providing some popular, common-sense leavening in the application of the law within the community.

Now this may very well mean that some juries will render verdicts which are in derogation of first amendment rights. And, with respect to this possibility, the fact that the precedential thrust of jury verdicts is weak and their corrosive effects consequently limited,[64] although somewhat palliative, is not completely reassuring. If there is a possibility, however, that the jury will be less sensitive to the defendant's first amendment claims than the trial judge would be, so too is there a possibility that it will be more so. While positive evidence that juries on the whole are more or less favorable to first amendment claims than trial judges would be interesting and useful, such evidence is not crucial to a determination of whether the social interest in freedom of expression would be subserved by extending the right to trial by jury to all prosecutions involving assertions of first amendment rights. To state the matter more explicitly, the libertarian tendencies of the jury, as compared with those of the judge, are of much less significance here than is the fact that in some cases and at some times some juries will react more favorably than do some judges toward criminal defendants who raise first amendment claims. Extension of the right to trial by jury to all criminal cases involving such claims would afford the defendant a practical choice between summary trial and trial by his peers — a choice which, as part of the defense

60 *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969).
61 KALVEN & ZEISEL, *supra* note 3, at 55-81.
62 *Id.* at 494.
63 *Id.*
64 Where the right to trial by jury exists, waiver by the defendant may, of course, be conditioned upon the consent of the prosecutor and the court. Singer v. United States, 380 U.S. 24 (1965). In practice, however, the prosecutor rarely objects to attempted waiver, and, if such objection would deny the defendant an impartial trial, it might be held inefficacious. *Id.* at 37-38.

strategy, could be made pragmatically in light of the facts of the particular case, the temper of the community, the assessed predilections of the trial judge, and other considerations. As the law now stands, the choice between summary and jury trial is often left to the prosecutor alone, because many proscribed activities which are arguably exercises of first amendment freedoms may be prosecuted under any of several statutes and ordinances. By electing to prosecute for a lesser offense, which by current definition is petty, the prosecutor may preclude trial by jury.[65]

The case for extending the right to jury trial to criminal prosecutions involving first amendment defenses does not, however, rest solely upon the libertarian effects which may be produced. In constitutional jurisprudence, as in no other area of the law, symbolism is important. If, as we have been reminded by the Court, first amendment freedoms are the preconditions of an open society, this in itself may be reason enough for enlisting the whole range of constitutionally mandated criminal procedures for their support and vindication. Moreover, this abstract symbolism has an immediately practical aspect as well. At a time when criminal convictions involving the conduct of the politically disaffected are decried as the harshly repressive outputs of the "establishment" and the "system"—when both the law and the judicial process are denounced as inimical to the "people"—the credibility of such ideological fulminations can only be augmented, and the alienation of dissenters deepened, by resort to summary proceedings without the consent of the accused. The judge epitomizes the establishment, particularly when the law-declaring and the fact-finding functions are mandatorily intermixed in his person. The jury, on the other hand, "enters as a stranger and leaves as a stranger."[66] Interposition of the jury, as a reflex of community values, in the adjudicatory process affords the judiciary a measure of insulation and, in this way, may buttress respect for the judicial process and for the rule of law.

65 This resembles, in one important respect, the prosecutorial discretion which would have existed if the Supreme Court had approved court-martial jurisdiction over overseas civilian dependents of military personnel in noncapital cases. This consideration was cited by the Court when it rejected the distinction between capital and noncapital cases as a proper basis for defining the right to trial in an article III court. Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 244-45 (1960).

66 See Wolf, *Trial by Jury: A Sociological Analysis,* 1966 WIS. L. REV. 820, 830.